Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 309(j) of the Communications Act - Competitive Bidding	)	PP Docket No. 93-253
	)	
	)	

To: Chief, Wireless Telecommunications Bureau

MOTION FOR DECLARATORY RULING

Central Wireless Partnership ("CWP"), acting pursuant to Section 1.2 of the Commission's rules, hereby moves for a declaratory ruling to clarify Section 24.720(l)(11)(ii) of the Commission's rules. More specifically, CWP requests a ruling that that section does not authorize a party (whose annual income has exceeded $40 million for the preceding three years) to qualify as a "small business" under Section 24.720(b) of the Commission's rules by forming a new separate subsidiary.* In support of this motion, the following is stated:

1. CWP is a consortium of small businesses, each of whom satisfies the definition of a "small business" under Section 24.720(b) of the Commission's rules. CWP intends to participate in the Block C auction for licenses in the Personal Communications Services ("PCS"), which is scheduled to commence

* The clarification should extend to all organizational structures which, as explained herein, would enable an entrepreneur with annual income in excess of $40 million to qualify as a small business by a new arrangement involving the same principals.

on December 11, 1995.

2. On July 18, 1995, the Commission released its Sixth Report and Order in the above-referenced docket. Implementation of Section 309(j) of the Communications Act, FCC 95-301 (July 18, 1995) ("Sixth Report and Order"). In the Sixth Report and Order, the Commission amended Section 24.720(l)(11)(ii) of its rules to limit the circumstances under which the annual income of a PCS applicant's affiliates would be considered in determining the applicant's eligibility as a "small business." More specifically, the Commission amended the rule as follows:

> For the C block, for purposes of § 24.709(a)(2) and paragraph (b)(2) of this section, an affiliate with gross revenues of less than $125 million in each of the last two years and total assets of less than $500 million at the time the applicant's short form application is filed, will not be considered an affiliate of an applicant (or licensee) that qualifies as a small business under section 24.720(b)(2) (small business definition) provided the gross revenues and total assets of all such affiliates, when considered on a cumulative basis and aggregated with each other do not exceed the amounts specified in section 24.709(a)(1) (entrepreneurs' block caps).

3. The Commission explained that the foregoing change in the affiliation rules would allow a qualified small business to preserve its status as a small business despite the presence of affiliates with collective annual revenues in excess of $40 million:

> For purposes of the affiliation rules, a small business applicant can exclude from coverage of the affiliation rules any affiliate of the small business applicant if the following conditions are met:

> (1) the affiliate would otherwise qualify as an entrepreneur pursuant to Section 24.709(a)(1) ($125 million in gross revenues and $500 million in total assets); and
>
> (2) the total assets and gross revenues of all such affiliates, when considered on a cumulative basis and aggregated with each other, do not exceed these amounts.

Sixth Report and Order at ¶ 33. The new affiliation rule would thus enable a qualified small business applicant to have an association -- either directly or through one of its owners -- with another company which would qualify as an entrepreneur but would not qualify as a small business.

4. Nothing in the Sixth Report and Order states that an entrepreneur with income in excess of $40 million can use the amended affiliation rule to create a new subsidiary -- which would have no prior income -- and thereby qualify as a small business. However, CWP has knowledge that the amended affiliation rule may be used by some applicants in that very way. To sanction that approach would be to completely emasculate the meaning of the term "small business." Every entrepreneur planning to participate in the Block C auctions could qualify as a small business simply by forming a subsidiary which would have no prior revenue.

5. Any use of the new affiliation rule along the foregoing lines would be contrary to the language of the amended affiliation rule and directly at odds with the Commission's prior statements explaining the exception. To appreciate that latter conclusion, it is useful to trace the evolution of the exception.

6. The Commission first adopted an exception to its affiliation rules in the Fifth Memorandum Opinion and Order. Implementation of Section 309(j) of the Communications Act 10 FCC Rcd 403 (1994). In that latter order, the Commission decided that it would not attribute to an applicant controlled by minorities or minorities and women the income and assets of a minority investor in the applicant: "the gross revenues and assets of affiliates that the minority investor controls will not be counted in determining the applicant's compliance with the financial caps, both for purposes of the entry into the entrepreneurs' block and for purposes of the applicant qualifying as a small business." 10 FCC Rcd at 425. The Commission explained that the exception was designed to enable minority investors "to bring their management skills and financial resources to bear in [the applicant's] operation without the assets and revenues of those other concerns being counted as part of the applicant's total assets and revenues." 10 FCC Rcd at 426. The Commission reasoned that applicants with minority owners needed "the ability to draw upon the financial strength and business experience of successful minorities and minority-owned businesses within their own communities." The Commission further observed that the exception would permit "minority applicants to pool their resources with other minority-owned businesses and draw on the expertise of those who have faced similar barriers to raising capital in the past." 10 FCC Rcd at 426 (footnotes omitted).

7. The exception, then, was intended to facilitate individual investments in applicants that otherwise satisfied the Commission definition of a "small business." The exception was not to be utilized as a subterfuge for parties to evade the financial caps for entrepreneurs or small businesses. See 10 FCC Rcd at 427 n.10. The Commission therefore made it clear that "a minority-owned firm that exceeds the financial caps would not be able to create a subsidiary to participate in a PCS applicant's control group." 10 FCC Rcd at 427 (footnote omitted).

8. The Commission echoed those same views when it expanded the exception to the affiliation rule in the Sixth Report and Order. As in the Fifth Memorandum Opinion and Order, the Commission wanted to enhance the ability of qualified small businesses to raise capital and secure appropriate management for a venture that would be capital intensive and very competitive:

> We believe that to some extent, these [small business] firms face barriers to raising capital not faced by the larger firms. In addition, small businesses experienced in managing smaller businesses should not be penalized because they own or are otherwise affiliated with other businesses whose assets and revenues must be considered on a cumulative basis and aggregated for purposes of qualifying for the C Block auction.

Sixth Report and Order at ¶32 (footnote omitted).

9. Nowhere in the Sixth Report and Order did the Commission repudiate its earlier statement that the exception would not apply to firms who formed a separate subsidiary to participate in the Block C auction. Nor did the Commission state in the Sixth Report and Order that an entrepreneur exceeding the

small business revenue caps could nonetheless qualify as a small business by forming a new separate subsidiary. Indeed, such action would fall outside the Commission's stated purposes in expanding the exception in the Sixth Report and Order. The expanded exception was designed to enable small businesses to raise capital and secure managerial assistance. Neither purpose would have any relevance to a newly-formed company owned by and dependent on a large entrepreneur.

10. The foregoing conclusions are reinforced by Section 24.720(f) of the Commission's rules. That subsection states, in pertinent part, as follows:

> If an entity was not in existence for all or part of the relevant period, gross revenue shall be evidenced by the audited financial statements of the entity's predecessor-in-interest. . .

By its own terms, that subsection plainly requires the Commission to review the audited financial statements of the parent of any newly-formed company in determining the applicant's prior annual income. That requirement assumes particular importance in understanding the amended affiliation exception's reference to "an applicant (or licensee) that qualifies as a small business under Section 24.720(b)(2). . ." (Emphasis added). In other words, before it applies the exception to the affiliation rules, the Commission must make a threshold determination that the applicant qualifies as a small business; under Section 24.720(f), that threshold determination requires consideration of the parent's annual income for a subsidiary that did not previously exist; hence, if a parent's annual income exceeded $40 million,

the applicant could not qualify as a small business and there would be no occasion to consider the exception to the affiliation rules.

11. Despite the language and purposes of the exception, it appears that some Block C applicants are planning to form subsidiaries with the expectation that that course would be sufficient for a party to qualify as a small business. Other entrepreneurs may be contemplating other schemes to achieve the same goal. It is impossible to assess the extent to which the amended affiliation rules would be used for those purposes, but the potential for abuse is enormous.

12. The Commission should foreclose such activity by immediately clarifying the scope of its newly-amended exception to the affiliation rules. Such clarification would be consistent with the Commission's broad power to interpret its own rules and would reduce, if not eliminate, later litigation over the issue. See National Association of Regulatory Utility Commissioners v. FCC, 746 F.2d 1492, 1502 (D.C. Cir. 1984) ("the FCC's interpretation of its own policies and regulations is entitled to 'great deference'" and an administrative interpretation is "of controlling weight unless it is plainly erroneous or inconsistent with the regulation").

13. Clarification of the exception would also be consistent with the Commission's statement that it wants to ensure "that the auctions are fair and do not present any bidder with an unfair competitive advantage . . ." Sixth Report and

Order at ¶ 33. Unless the Commission acts now, qualified small businesses and small business consortia will be forced to bid against applicants who believe -- wrongly -- that they are entitled to the bidding credits and favorable installment plan made available only to a small business or a small business consortium. Those larger companies could completely skew the auction by advancing bids substantially higher than they would otherwise make if they did not have access to the bidding credits and favorable installment plan made available only to small businesses and small business consortia. The ensuing harm to qualified small business applicants -- and the Commission's basic purposes in establishing the framework for Designated Entities -- would be irreparable.

WHEREFORE, in view of the foregoing, it is respectfully requested that the Commission forthwith clarify its expanded exception to its affiliation rules to prohibit an entrepreneur from qualifying as a small business by forming a new separate subsidiary.

Respectfully submitted,

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